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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

Michelle Leigh Selgas,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Michelle Leigh Selgas
Petitioner *pro se*
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Petitioner in propria persona

April 2007

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred by departing from the fundamental principles of judicial review by overlooking the minimum standards related to Due Process for Collections of tax mandated by Congress [codified at I.R.C. §6330(c)(1)], which requires review of the "verification from the Secretary ['a written declaration made under the penalties of perjury', see I.R.C. §6065] that the requirements of any applicable law or administrative procedure have been met"?

2. Whether the "Due Process" provisions of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA") overrule this Courts long standing precedence that the collection of tax by distraint of personal property prior to any due process of law is lawful so long as a hearing is granted thereafter?

3. Whether the RRA guarantees (to the person who timely requests a hearing) a right to a fair hearing before an appeals officer, prior to any lien, levy or distraint of personal property for collection of taxes can occur?

4. Whether RRA, codified in part at I.R.C. §6330(c)(1), which states "The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met", is a congressional mandate to the Internal Revenue Service Office of Appeals that creates the "minimum standard" for Due Process for Collection hearings?

5. Is a employee of the Internal Revenue Service who lacks delegation of authority authorized to "send notice of such deficiency to the taxpayer by certified mail or registered mail", pursuant to I.R.C. §6212(a)?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioner: "Michelle Leigh Selgas" and Respondent: "Commissioner of Internal Revenue").

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PETITION FOR WRIT OF CERTIORARI

Michelle Leigh Selgas respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Tax Court, as affirmed (Affirmance Without Opinion) by the United States Court of Appeals for the Fifth Circuit. This is a case of first impression requiring the exercise of this Court's supervisory power to eliminate the confusion in the Circuit Courts [see *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005)] created by the enactment of the "Due Process" provisions of Sec. 3401 of Subtitle E of Title III of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, §3401, 105th Cong., 2d Sess., 112 STAT. 685, 746-750 ("RRA98"), as codified in part at I.R.C. §6330. The RRA98 overruled nearly 130 years of precedence that the Circuit Courts have relied upon to make their Due Process decisions relating to the collection of tax by distraint; thereby leaving the Circuit Courts rudderless and wandering in a sea of uncertainty until such time as this Court:

1) states with certainty that the "Due Process" provisions of Sec. 3401 of Subtitle E of Title III of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, §3401, 105th Cong., 2d Sess., 112 STAT. 685, 746-750 ("RRA98"), as codified in part at I.R.C. §6330, overrules this Courts long standing precedence that the collection of tax by distraint of personal property prior to any due process of law, is lawful so long as a hearing is granted thereafter;

2) resolves the conflict between the statutory Due Process provisions enacted into law at Pub. L. 105-206, §3401(b) Part 1 Sec. 6330(c)(1), 112 STAT. 685, 748, codified at I.R.C. §6330(c)(1), and the regulations promulgated by the Secretary as Tres. Reg 301.6330-1(e); and

3) enforces the minimum standards for judicial review of Due Process for Collection hearings

mandated by Congress in RRA98, codified at I.R.C. §6330(c)(1), which unequivocally requires a review of the "verification from the Secretary ['a written declaration made under the penalties of perjury', see I.R.C. §6065] that the requirements of any applicable law or administrative procedure have been met", prior to any collection of tax by distraint.

OPINIONS BELOW

A copy of the Opinion enter September 20, 2005, by Special Trial Judge, D. Irvin Couvillion, of the United States Tax Court is attached as Appendix A.

A copy of the Fifth Circuit's Affirmance Without Opinion (per Jolly, J., Higginbotham, J., and Dennis, J., Circuit Judges) as entered on December 11, 2006 is attached as Appendix B.

A copy of the Fifth Circuit's denial for rehearing (per Jolly, J., Higginbotham, J., and Dennis, J., Circuit Judges) as entered on January 23, 2007 is attached as Appendix C.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Affirmance Without Opinion on December 11, 2006. Appx B. Petitioner's timely petition for rehearing was denied by Order filed January 23, 2007. This petition is being filed on or before the 90th day thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUES INVOLVED[1]

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

RRA98 §3401(a), I.R.C. §6320, NOTICE AND OPPORTUNITY FOR HEARING UPON FILING OF NOTICE OF LIEN.

...

"(b) RIGHT TO FAIR HEARING.—

"(1) IN GENERAL.—If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.

...

"(c) MATTERS CONSIDERED AT HEARING.—In the case of any hearing conducted under this section—

"(1) REQUIREMENT OF INVESTIGATION.—**The appeals officer shall at the hearing obtain verification from the Secretary** that the requirements of any applicable law or administrative procedure have been met. [emphasis added]

RRA98 §3401(b), I.R.C. §6330, NOTICE AND OPPORTUNITY FOR HEARING BEFORE LEVY.

...

"(b) RIGHT TO FAIR HEARING.—

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[1] Sec. 3401 of RRA98 is cited in its entirety in Appx. D and the remaining Statutes excerpts cited in this section, are set forth in their un-excerpted form in Appx. E to this Petition.

"(1) IN GENERAL.—If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.

...

"(c) MATTERS CONSIDERED AT HEARING.—In the case of any hearing conducted under this section—

"(1) REQUIREMENT OF INVESTIGATION.—**The appeals officer shall at the hearing obtain verification from the Secretary** that the requirements of any applicable law or administrative procedure have been met. [emphasis added]

I.R.C. §6201. Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, **determinations**, and assessments of **all taxes** (including interest, additional amounts, additions to the tax, and assessable penalties) **imposed by this title**, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. **Such authority shall extend to and include the following**:

(1) **Taxes shown on return**

The Secretary shall assess all taxes determined by the taxpayer or **by the Secretary** as to which **returns** or lists are **made under this title.**[emphasis added]

I.R.C. §6020. Returns prepared for or executed by Secretary

...

(b) Execution of return by Secretary

(1) **Authority of Secretary to execute return**

If any person fails to make any return required by any internal revenue law or regulation made

thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the **Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.**

(2) Status of returns

Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes. [emphasis added]

I.R.C. §6211. Definition of a deficiency

(a) In general

For **purposes of this title in the case of income,** estate, and gift taxes imposed by subtitles A and B and excise **taxes imposed by** chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by **subtitle A** or B, or chapter 41, 42, 43, or 44 exceeds the excess of -

(1) the sum of

...

(B) **the amounts previously assessed** (or collected without assessment) **as a deficiency,** over

...[emphasis added]

I.R.C. §6212. Notice of deficiency

(a) In general

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 **he is authorized to send notice** of such deficiency to the taxpayer **by certified mail or registered mail.** Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office. [emphasis added]

STATEMENT OF THE CASE

This case arises out of the United States Tax Court erroneously granting summary judgment in favor of the Respondent while substantial issues of material fact (related to the questions presented) are still in dispute.

The Petitioner, a housewife living in the state of Texas, was sent a Collection Due Process (CDP) hearing scheduling notice on August 9, 2004 and a subsequent follow-up notice on August 23, 2004, both from Wallace G. Banks, a Revenue Officer of the Internal Revenue Service, indicating that the Petitioner's requested CDP hearing would take place via telephone at 1:00 p.m. on August 30, 2004. At approximately 10:00 a.m. on August 30, 2004 (three hours prior to the "noticed" CDP hearing time) Revenue Officer Banks called Wayne A. Paul, the Petitioner's Certified Public Accountant, to inform him that the CDP hearing was going to be held immediately and asked Mr. Paul if Michelle L. Selgas, the Petitioner, was available. Mr. Paul responded by saying: "No, we cannot hold the CDPH [CDP Hearing] right now as I am not in my office, nor is Michelle Selgas available." Mr. Paul then asked Mr. Banks to call back at the pre-scheduled [notice] time of 1:00 p.m. for the hearing or to reschedule the hearing for a later date and time. There was no subsequent contact made by any IRS personnel for the actual 1:00 p.m. scheduled hearing or a rescheduling thereof.

An examination of the constitutional due process and the statutory "Due Process for Collection" requirements, as clearly and unambiguously mandated by Congress in the RRA98,are summarized below:

Constitutional Due Process Requirements

This Court has held that "due process" requires:

1. "Notice"
2. "A fair opportunity to participate or be heard before an impartial panel or party"

Statutory Due Process for Collection Requirements

Sec. 6330 of the RRA98 (112 STAT. 685, 747-749) mandates the following Due Process for Collection items:

1. "Right to Fair Hearing";
2. The "hearing shall be held by the Internal Revenue Service Office of Appeals";
3. Hearing will be before an impartial "appeals officer";
4. The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

Thus, based upon the due process requirements outlined above, which are shown in combination with the evidence from the record in the table below, it becomes patently clear that the Tax Court erred in accepting one of the Respondent's summary judgment claims that a Due Process for Collection hearing had been held.

Due Process Requirements	Actual Events as it relates to the Petitioner	Pass or Fail
Notice of Hearing	Notice scheduled hearing for 1:00 p.m. on 08/30/2004 a call from Revenue Officer Banks came in at 10:00 a.m.	Failed
Fair Opportunity	No hearing took place; thus no opportunity to be heard was given.	Failed
Fair Hearing	No hearing took place.	Failed
Rep. from IRS Appeals Office	Revenue Officer Banks was from the IRS Settlement Office of the Office of Appeals	(?)
IRS Appeals Officer (GS-0930)[2]	10:00 a.m. call initiated by a Revenue Officer (GS-1169)[2]	Failed
Verification by Secretary at hearing	No hearing took place, and nothing indicates that the Secretary made a "verification"	Failed

As a result of the Tax Court's error, the Petitioner was denied a legitimate judicial forum to address the substantial issues of material fact still in dispute in this case, which in part resulted from the Respondent's failure to ensure that a duly authorized appeals officer[2] held the Petitioner's scheduled Due Process for Collection hearing, and in part by the conflicting language between the enacted law codified at I.R.C. §6330(c)(1) and the Treas. Reg. promulgated under 301.6330-1(e). The result of the confusion was a failure of an appeals officer at the hearing to obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. Without verification from the Secretary that the requirements of any applicable law or administrative procedure have been met, false and unsupportable claims – caused for example by, erroneous computer entries in a master file, over-zealous employees looking to make a name for themselves, or retaliation for complaints against IRS employees – could appear as valid under the Court's presumption that all IRS documents are prima facie good. Such is the case in chief.

For example, the declaration of Wallace Banks' contains several factual errors and omissions, including but not limited to:

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[2] I.R.C. §6330(c)(1) mandates that an "appeal officer shall at the hearing obtain verification from the Secretary ..." The Office of Personnel Management and the Department Of Treasury Official Personnel Office Actions categorize "appeals officers" under the "Position Classification Standard" of GS-0930. Wallace Banks was in the Position Classification Standard of GS-1169, which authorized him to participate in any resulting appeals proceedings as an expert witness to give evidence to sustain the Government's position. Not to hold the hearing as an impartial "appeals officer". [U.S. Office of Personnel Management, Doc. TS-126; www.opm.gov/fedclass/gs1169.pdf]

1) Mr. Banks' declaration that he is a "settlement officer", is in conflict with Secretary's copy of his Official Government Employment Record, SF-50B form, which indicates that he is a Revenue Officer;
2) Mr. Banks' declaration: "*I made the determination ... to permit the collection action to proceed. The reasons for, and the facts underlying, my determination are found in the Notice of Determination, dated September 1, 2004, a true and correct copy of which is attached hereto as Exhibit A.*"
   a. However, the face of said "*Notice*" is signed by David Lowell, Appeals Team Manager, indicating that Mr. Lowell made the "determination" (not Mr. Banks) based upon an "attached statement show[ing], in detail, the matters we considered at your Appeals hearing and our conclusions about them." Said "attached statement" is an undated, unsigned and unverifiable document constituting hearsay.

   Additionally the Declaration of Mr. Lowell indicates that "*on August 31. 2004*" he reviewed the "*Attachment to the Determination Letter prepared by Settlement Officer Banks*", which is in conflict with the Declaration of Mr. Banks, which states: "*The reasons for, and the facts underlying, my determination are found in the Notice of Determination, dated September 1, 2004*". Hence Mr. Banks claims to have made his determination the day after Mr. Lowell claims to have reviewed it. Thus, one or both of their declaration statements is erroneous or false.
   b. Further the "*Attachment to the Determination Letter prepared by Settlement Officer Banks*" is erroneous, including the statement that "*[t]he IRS did post a Statutory Notice of*

Deficiency / 90-day letter TC 494 indicator to the taxpayer's individual master file." The simple truth is the individual master file records supplied by the Secretary's disclosure office to the Petitioner dated, "07-25-2003", "Dec 11, 2003", "09-03-2004" and "09-29-2004" show that there never was a Statutory Notice of Deficiency/90-day letter TC 494 indicator posted to the individual master files pertaining to the Petitioner. Hence Mr. Banks and Mr. Lowell relied upon erroneous information to make their determination.

3) There is no indication in either Mr. Lowell's or Mr. Banks' declarations or in the purported "Notice of Determination" that "*The appeals officer ... at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met*" as mandated by Congress and codified at I.R.C. §6330(c)(1). Rather, the purported "Notice" states: "*Based on the information available, it has been concluded that all required laws and procedures have been followed.*" Thus, demonstrating that no verification by the Secretary was made.

Had the Respondent fulfilled his duty to review the complete administrative record, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) , or used a little wisdom and common sense to review the administrative record files obtained by the Petitioner from the Secretary's disclosure office[3], he wouldn't have

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[3] The Petitioner made nearly ninety Freedom of Information Act (FOIA) requests related to administrative record documents maintained by the Secretary on the Petitioner in this matter. The Secretary's disclosure office provided the Petitioner with documents, which include but are not limited to those that indicate: 1) that I.R.S. employees involved in this case were

been duped into believing the erroneous, unsupportable and unsubstantiated entries in the computer master file records pertaining to the Petitioner. Neither would he have been deceived into "*carte blanche*" acceptance of what is written on the face of an unsworn or unsubscribed document.

Additionally other documents obtained through FOIA erroneously assert that the Petitioner, a Texas housewife and mother of two children, has a purported tax liability arising from some non-existent tax liability[4] of her husband. The administrative record is replete with documents that indubitably show that the Petitioner has no liability of tax due and owing to the United States[5] and that the Secretary did not send the Petitioner a notice of deficiency. Had the Petitioner been actually given lawful and meaningful due process, this petition would be unnecessary.

Did the Tax Court err in granting the Respondent's motion for summary judgment? Yes – As discussed above, the record shows that substantial issues of material fact are still in dispute, and were erroneously resolved against

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operating outside of their delegated authority to send certain types of notice; 2) that the Secretary did not make any returns, pursuant to I.R.C. §6020(b), for the Petitioner from which a determination could be made; 3) that the Secretary did not send the Petitioner any notice[s] of deficiency; 4) that some of the Respondent's employees "labeled" documents pertaining to the Petitioner with the words "constitutionally challenged" as a method to invoke discriminatory behavior in the Respondent.

[4] The United States Tax Court, dismissed in the Petitioner's husband's case (*Thomas Drennan Selgas v. Commissioner of Internal Revenue*, United States Tax Court 9188-04L (2005)) dealing with the same years and facts for lack of jurisdiction.

[5] On April 2, 2007, while drafting this petition, the Respondent sent Notice Number "CP49" to the Petitioner indicating that she has an "Overpayment" of tax for some of the year(s) that Revenue Officer Banks and Appeals Officer Lowell purportedly determined that she had a deficiency.

the Petitioner by the Tax Court. The granting summary judgment is not a question of discretion, but of law. Disputed facts have to be decided in favor of the non-moving party as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Accordingly, this case must be REVERSED and REMANDED for further proceedings.

The second issue in this case is one of subject matter jurisdiction, which the Petitioner contends that the Tax Court lacked for two reasons: 1) the Secretary failed to send the Petitioner notice[s] of deficiency pursuant to I.R.C. §6212(a); and 2) the Petitioner was not given a due process for collection hearing pursuant to I.R.C. §6330, as discussed in great detail above.

In reference to the Secretary's failure to send the Petitioner notice[s] of deficiency pursuant to I.R.C. §6212(a), the Petitioner obtained substantive documents from the Secretary's disclosure, which included but not limited to: 1) individual master files records pertaining to the Petitioner that lack any Statutory Notice of Deficiency/90-day letter TC 494 indicator; 2) the Official Government Employment Records, SF-50B forms, of Cherry Elder and Sharon K. Brown, showing that neither held the required "Position/Title" specified in Delegation Order No. 4-8 to act for or on behalf of the Secretary pursuant to I.R.C. §§6212(a) and 7701(a)(11)(B)-(12)(A)(i) to send a notice of deficiency; and 3) documents showing that the Secretary did not make or examine any returns to substantiate a deficiency. Thus the Tax Court lacked jurisdiction to grant the Respondent's Motion for Summary Judgment. The Tax Court's jurisdiction is predicated by the Secretary sending the Petitioner a lawfully valid notice of deficiency, which was not and has not been done in this case. Accordingly, this case must be REVERSED and REMANDED with SUPERVISION.

The third issue in this case is a Constitutional issue of due process of law, which the Petitioner has been denied. The Fifth Amendment to the Constitution of the United

States of America guarantees that "no person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Petitioner has been denied due process at every step in the administrative process thus far. Her constitutionally guaranteed right, which has now been statutorily defined to correct the evils, wrongs or unnecessary harshness as a result of the misapplication of law [*Springer v. U S*, 102 U.S. 586, 594(1880)], to be afforded a fair opportunity for hearing in connection with the collection of taxes prior to distraint of personal property has been denied. The Respondent failed in his statutory duty, pursuant to I.R.C. §§6320(b), 6330(b)-(c), 6331(j)(2)(A), to obey the law and grant the Petitioner a due process collection hearing.

The government's right of the collection of taxes by distraint of personal property is lawful, only upon the verification from the Secretary that the requirements of any applicable law or administrative procedure have been met and a valid assessment exists. It is indubitably clear from the documents the Petitioner received from the Secretary's disclosure office[3] that the Secretary made no verification, no determinations, no assessments, nor sent the Petitioner notices of deficiency. Further, the Respondent failed to examine and process the returns made by the Petitioner through counsel, and the Secretary did not make any returns for the petitioner, pursuant to I.R.C. §6020(b), either type of return being necessary for a lawful determination of a deficiency to exist, pursuant to I.R.C. §§6201(a)(1), 6211, 6212. Hence, without examining a return, no determination can be made, no notice of deficiency can be sent and no assessment can exist. Additionally, the Petitioner, being denied both an administrative appeals hearing and a due process collection hearing – which mandates that the "appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any

applicable law or administrative procedure have been met" – further exemplifies that no verification was done.

In summary, common sense and reason dictate that the Petitioner does not have an outstanding tax liability to the United States government arising from some unpaid and unidentified tax liability of her husband, since the Secretary never established that her husband had any income from which an outstanding tax liability to the United States government was owed.[4]

REASONS FOR GRANTING WRIT

I. THE ENACTMENT OF THE "DUE PROCESS" PROVISIONS OF LAW IN THE RRA98, CODIFIED AT I.R.C. §§6320 AND 6330, HAVE LEFT THE LOWER COURTS STRUGGLING TO DETERMINE WHAT THE MINIMUM JUDICIAL REVIEW STANDARDS SHOULD BE FOR CASES ARISING OUT OF A COLLECTION DUE PROCESS HEARING.

One reason for this confusion stems from this Court's long standing Precedence that:

> "[t]he right of the United States to collect its internal revenue by summary administrative proceedings ... [where] ... adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained", *Phillips v. C.I.R.*, 283 U.S. 589, 595 (1931).

This Court's holding on the due process requirements relating to the collection of tax has always been contentious because it appears to fly in the face of the plain unambiguous language of the Fifth Amendment to the Constitution of the United States of America which, in part, states "no person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." However, with the enactment of the RRA98, Congress has now mandated due process requirements of law relating to the collection of tax in conformity with the language and general public's understanding of the Fifth Amendment. That is, by enacting RRA98, Congress has corrected the due process evils that existed for nearly 130 years as it relates to the collection of tax by distraint, which were spoken of by this Court when it said: "*If the laws here in question involved any wrong or unnecessary harshness, it was for Congress,*

or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government." *Springer v. U S*, 102 U.S. 586, 594 (1880). Hence, the due process provisions mandated in RRA98 have done away with the evils of the collection of tax prior to adequate opportunity of due process, which, in the past, bound this court to render decisions, such as *Springer* and *Phillips*, contrary to current law and the plain language and general public's understanding of the due process clause of the Fifth Amendment. Yet, the United States Court of Appeals for the Fifth Circuit does not recognize this change in the law; it simply finds that any such tax related administrative due process claims or arguments "do not merit any serious consideration"; *Rayner v. Commissioner*, Footnote 9, No. 02-60565 (5th Cir. 2003).[6] Thereby, explaining the lack of a substantive record from the 5th Cir. in this matter. That is, logic demands that since the 5th Cir.'s standing precedence in tax related due process claims "*do not merit any serious consideration*", no substantive review of the issue was made and, thus, no substantive record could be created.

The other reason for the lower Courts' confusion, which was eloquently stated by the 6th Cir.:

> "**The method or standards for judicial review of these hearings [CDP hearings] is not yet settled, hence the problems in these cases**. Prior to this Act, the IRS had the right to levy on taxpayer property without any prior opportunity for a hearing." *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005). [emphasis added]

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[6] The last case the Fifth Circuit heard on the issue relating to Due Process prior to the Collection of Tax was *Jones v. C.I.R.*, 338 F.3d 463 (5th Cir. 2003), which was decided approximately three weeks prior to the *Rayner v. Commissioner*, decision.

Thus, explaining why the 5th Cir. has, in effect, given-up on making any judicial review of tax related due process claims by simply stating that they "*do not merit any serious consideration.*" As a result, the Petitioner, like many others, is left wondering where her right to due process went; thereby necessitating this Court's need to answer the first four questions posed at the beginning of this Petition:

1. Whether the Fifth Circuit erred by departing from the fundamental principles of judicial review by overlooking the minimum standards related to Due Process for Collections of tax mandated by Congress [codified at I.R.C. §6330(c)(1)], which requires review of the "verification from the Secretary ['a written declaration made under the penalties of perjury', see I.R.C. §6065] that the requirements of any applicable law or administrative procedure have been met"?

2. Whether the "Due Process" provisions of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA") overrule this Courts long standing precedence that the collection of tax by distraint of personal property prior to any due process of law is lawful so long as a hearing is granted thereafter?

3. Whether the RRA guarantees (to the person who timely requests a hearing) a right to a fair hearing before an appeals officer, prior to any lien, levy or distraint of personal property for collection of taxes can occur?

4. Whether RRA, codified in part at I.R.C. §6330(c)(1), which states "The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met", is a congressional mandate to the Internal Revenue Service Office of Appeals that creates the "minimum standard" for Due Process for Collection hearings?

Frankly, it doesn't take much to meet the minimum standard judicial review requirements arising from a Due Process for Collection hearing; it only requires the Court to review two or, at most, three documents:

1) A "verification" [in conformance with the verification mandates codified in I.R.C. §6065] executed by the Secretary, [in conformance with the mandates codified in I.R.C. §6330(c)(1)], and

2) A declaration from the appeals officer of the Internal Revenue Service stating:

a) advanced Notice of time, date and place for the Collection Due Process hearing was given;

b) the hearing was held on the time and date. and at the place given in the Notice

c) the Secretary provided a verification "that the requirements of any applicable law or administrative procedure have been met."

3) A "rebuttal" declaration made by the petitioner of said Collection Due Process hearing.

Hence, a Court only needs to review up to three simple declarations, each subscribed under penalty of perjury, by the Secretary, the Internal Revenue Service appeals officer, and the Petitioner to meet the minimum standard judicial review requirements arising from a Due Process for Collection provisions enacted in to law under the RRA98.

It is important to remember that the case in chief was decided on a motion for summary judgment, even though there are substantial issues of material fact still in dispute, as a result of the Secretary's failure to make a verification (pursuant to RRA98) and the failure of an Internal Revenue Service appeals officer to hold the Collection Due Process hearing at the date, time and place Noticed.

As discussed earlier, the Petitioner was not afforded a fair opportunity for hearing in connection with the collection of taxes because the Respondent failed in his

statutory duty, pursuant to I.R.C. §§6320(b), 6330(b)-(c), 6331(j)(2)(A), to see that the Petitioner was afforded a fair opportunity for hearing in connection with the collection of tax with proper notice and participation of the Secretary to the extent necessary to verify that the requirements of any applicable law or administrative procedure have been met.

II. THE TAX COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS THE EVIDENCE PRESENTED SUBSTANTIAL AND MATERIAL FACTUAL DISPUTES.

Three substantial and material fact issues still exist:

1) Whether the documents purporting to be notices of deficiency were sent by the Secretary as mandated in I.R.C. §§6212(a), 7701(a)(11)(B)-(12)(A)(i);

2) Whether the Secretary made a determination as mandated under I.R.C. §§6201(a)(1), 6211(a)-(b), 6212(a);

3) Whether an unscheduled telephone call made by a Revenue Officer to the Petitioner's Certified Public Accountant (CPA), lasting only a few minutes, constituted a Due Process for Collection hearing in accordance with the Internal Revenue Service Restructuring and Reform Act of 1998, Title III, Subtitle E, Part I, §3401 Pub. L. 105-206, 112 STAT. 685, 746-750.

FACTUAL DISPUTE 1, PURPORTED NOTICES OF DEFICIENCY

The Respondent failed to prove beyond dispute that the two documents purporting on their face to be notices of deficiency were valid and in fact constituted Statutory Notices of Deficiency. In order to initiate tax collection proceedings, the Secretary is required to make a lawful determination and send a valid notice of deficiency to a taxpayer; see I.R.C. §§6212(a) and 7701(a)(11)(B)-(12)(A)(i). It would appear from the signature, printed name and position/title shown on the face of said documents that an IRS employee named Cherry Elder, holding the position/title of "Territory Manager", sent

them to the Petitioner[7]. However the Respondent claims that it was another IRS employee named Sharon K. Brown, whose name appears on the face of the said documents, as the "Person to Contact". However, neither one of them was acting in the capacity of the Secretary as mandated by I.R.C. §§6212(a), 7701(a)(11)(B)-(12)(A)(i) to make a determination and send the Petitioner a notice of deficiency; therefore said purported notices are void. That is, on October 7, 2003, and October 14, 2003, the Secretary of Treasury's disclosure office provided substantive evidence to the Petitioner that neither Ms. Elder or Ms. Brown were in delegated positions of authority to act as or on behalf of the Secretary in matters relating to making determinations and sending notices of deficiency. It is important to point out to the Court that the Secretary of Treasury's disclosure office notified the Petitioner within 90-days after receiving said documents[8]; that Cherry Elder, at the time the documents were sent to the Petitioner, was acting in the position/title of "Program Manager" (not Territory Manager as shown on the face of the documents) and Sharon K. Brown was acting in position/title of "Internal Revenue Agent" neither position/title being authorized to send or issue a notice of deficiency pursuant to the Secretary's Delegation Order 4-8;[9] therefore eliminating any potential claim of the Respondent that the Petitioner should have petitioned the Tax Court because of a presumption of the documents' correctness. That is, the substantive evidence provided to the Petitioner by the Secretary's disclosure office

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[7] In evidence at Petitioner's Reply, Dkt. 4, Ex. 8.

[8] In evidence, see Petitioner's Reply of Dkt. 4, Ex. 3. Note: Notices of deficiency are often referred to "90-day letters" because after mailing a valid notice of deficiency, the IRS must give the taxpayer ninety days to petition the Tax Court for a redetermination of the deficiency before making an assessment. 26 U.S.C. ' 6213(a).

[9] In evidence at Petitioner's Reply, Dkt. 4, Ex. 6

overcame the documents' presumption of correctness forcing the Petitioner to withdraw her efforts in petitioning the tax court since it did not have jurisdiction without a valid notice of deficiency being issued.

Therefore it is clear that a material question of fact exists as to whether the documents purporting to be notices of deficiency were valid and, in fact, Statutory Notices of Deficiency at all.

Disputed fact issues must be decided in favor of the non-moving party as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Accordingly, for purposes of determining summary judgment, the finder of fact was legally required to find that the documents purporting to be notices of deficiency were not sent by a person authorized to send them under Delegation Order No. 4-8. In other words, they were invalid and void.

The authority delegated by Delegation Order No. 4-8 may not be re-delegated. A party seeking summary judgment bears the initial burden of showing the district court that there is an absence of a genuine dispute over any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). This burden may be discharged either by producing evidence showing the absence of a genuine issue of material fact or by " 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Id. at 325, 106 S.Ct. at 2554. In order to defeat a motion for summary judgment after the movant has carried its initial burden, the nonmoving party must present some "specific facts showing that there is a genuine issue for trial." Id. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)). The Petitioner – the non-moving party herein – has done so, by introducing evidence that Cherry Elder is a "Program Manager", and introducing Delegation Order No. 4-8.

It is conveniently claimed by the Respondent that Cherry Elder (a Program Manager) was "reassigned" to

permit her to sign such documents.[10] This would constitute a plain re-delegation of the delegated authority which Delegation Order No. 4-8 says cannot be further delegated. However and more profoundly, the Respondent has never produced any evidence that Cherry Elder was, in fact, "reassigned" and so authorized. The burden of proof for summary judgment has simply not been met.

The evidence that Cherry Elder did not bear a job title or position authorized to sign any statutory notices of deficiency is a specific fact showing that there is a genuine issue for trial. It is not conclusive, perhaps – but it is relevant and material. The non-movant need not prove beyond peradventure that she would prevail on the issue at trial; she must only demonstrate there is some substantial evidence to support her position. As the Petitioner has amply met this standard; the grant of summary judgment was erroneous.

The Respondent also contends that Sharon K. Brown, and not Cherry Elder, signed Cherry Elder's name to the purported notices of deficiency. Again, this would constitute a plain re-delegation of authority which Delegation Order No. 4-8 forbids. Thus, it would constitute an unlawful re-delegation of authority.

Finally, the Respondent contends that Sharon K. Brown, an Internal Revenue Agent, was authorized to sign and send the purported Statutory Notice of Deficiency. While the CIR has flexibility in assigning his staff, he may not use this flexibility to undermine Delegation Order No. 4-8. An actor playing a doctor on television is no more authorized to write prescriptions than any internal revenue agent playing the part of a Revenue Agent Reviewer is to send out statutory notices of deficiency. The position may not be re-delegated.

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[10] In evidence at Respondent's Motion for Summary Judgment, Dkt. 10, Ex. 6.

Either an individual holds a document Position/Title office, or they do not. A manager on vacation may have an assistant manager run the department in his absence; items that can only be acted on by a manager will have to await the manager's return. The CIR has the authority to promote an individual to the position of Revenue Agent Reviewer or Territory Manager - he does not have the authority to re-delegate the authority of a Revenue Agent Reviewer to any employee at whim by having that employee "fill in" for the actual Territory Manager or Revenue Agent Reviewer. To do so would violate the clear language of Delegation Order No. 4-8.

FACTUAL DISPUTE 2, DETERMINATION BY THE SECRETARY

I.R.C. §§6201(a)(1), 6211(a)-(b), 6212(a) set out, prima facie, the Secretary's lawful "determination" and "deficiency" procedures. In addition I.R.C. §6020(b), sets out, prima facie, the procedures for the Secretary to make a return when a return has not been made, is false or fraudulent. "Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes", I.R.C. §6020(b)(2), including the lawful requirements to make a "determination" for a "deficiency".

The Petitioner and her husband hired Counsel who, in turn, hired Certified Public Accountants to make joint returns, pursuant to I.R.C. §§6011 and 6012 for the tax years 1997-2001. Said returns were much later claimed "unprocessable" by I.R.S. Counsel[11]. If said returns were

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[11] On Tuesday July 19, 2005, IRS counsel admitted, in a conference with the Petitioner's husband and U.S. Tax Court Judge Mark V. Holmes, having possession of said joint-returns, but claimed they were "unprocessable". The Petitioner's husband objected to IRS counsel's claim of "unprocessablity" and Judge Holmes ordered IRS counsel to produce the joint-returns at their office on August 8, 2005. When the Petitioner's husband and the Petitioner's lawyer went to the IRS Counsel's

in fact "unprocessable", the Secretary had a duty, pursuant to I.R.C. §6020(b), to make a return and subscribe his name thereto in order for him to make a determination as required by I.R.C. §§6201(a)(1), 6211(a)-(b), 6212(a). The Secretary made no such subscribed returns or amended returns as evidenced by the Secretary's response to the Petitioner's FOIA / Privacy Act Request[12] for production of the Form 1040, 1040A or 1040X returns purportedly made and used as the basis for the Secretary's determination that the Petitioner had a tax liability to the United States. Hence, the Secretary did not make, review (examine) or amend any returns made by or on behalf of the Petitioner from which a deficiency could arise, and therefore, the purported claim of a deficiency by the Respondent is utterly false. Accordingly, this case must be REVERSED and REMANDED for further proceedings

FACTUAL DISPUTE 3, PURPORTED DUE PROCESS HEARING

The Affidavit of Wayne A. Paul[13] and the Declaration of Wallace G. Banks are factually consistent in that:

1) An unscheduled and un-noticed telephone call was made by Mr. Banks to Mr. Paul at 10:00 AM on August 30, 2004;
2) The Notice and subsequent letter confirming the Collection Due Process Hearing (CDPH) set a date and time certain of 1:00 p.m. on August 30, 2004.

Further the Affidavit of Wayne A. Paul indicates that he timely objected to the unscheduled 10:00 a.m. telephone call from Mr. Banks as representing a CDPH

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office, the IRS counsel was conveniently absent. The IRS never produced the claimed "unprocessable" returns.

[12] The Petitioner received ten FOIA response letters, stating "In checking our records, we found no responsive documents pertaining to your request seeking a Form 1040X or Form 1040A/1040 ... for the [1997 – 2001] tax year[s]".

[13] In evidence at Petitioner's Reply, Dkt. 4, Ex. 16, pgs. 1-2

when he stated "*[N]o, we cannot hold the CDPH right now as I am not in my office, nor [i]s Michelle Selgas available.*"

Thus the outstanding factual question to be answered is: whether an unscheduled and un-noticed telephone call, which was timely objected too, constitutes a collection due process hearing (pursuant to RRA98)?

Hence, there exists a disputed material question of fact as to whether a collection due process hearing was in fact conducted. And for that reason, summary judgment was inappropriate and the Tax Court erred.

The Respondent, and the Tax Court, obfuscated this issue by emphasizing the lack of evidence as to whether Mr. Paul or the Petitioner attempted to personally contact Mr. Banks at the time Mr. Banks scheduled the hearing. This is a red herring, which goes nowhere. The notice, subsequent confirmation letter and the statement made by Mr. Paul to Mr. Banks specifically stated that Mr. Banks would call Mr. Paul's office.[14]

CONSTITUTIONAL MATTERS OF DUE PROCESS

The Respondent proclaims in a footnote that the 5th Amendment right to Due Process of Law is inapplicable in a Collection Due Process Hearing, because the hearing itself is statutory, not constitutional. This is strange indeed; the right to an appeal is both statutory, and constitutional. Would the Respondent then argue that to deny the Petitioner an appeal would not infringe on her Constitutional right to due process of law? Would it comply with principles of Due Process of Law for this Honorable Court to set deadlines for submission of briefs and not publish those deadlines? Or to set oral argument

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[14] In evidence at Petitioner's Reply, Dkt. 4, Ex. 16, pgs. 1-2; and Respondent's Motion for Summary Judgment, Dkt. 10, Exs. C-D

on a case without providing both parties the opportunity to appear and be heard?

The Petitioner has a due process right to have the laws fairly and impartially administered. Arbitrarily denying a statutory right is a violation of the Due Process Clause.

As Justice Scalia has noted, due process guarantees that all persons will receive that process which is due. See *Schad v. Arizona*, 501 U.S. 624, 651 (1991) (Scalia, J., concurring); see also *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003)("[t]he Due Process Clause requires only that process which is due under the circumstances of the case. . ."). As the Eighth Circuit noted in *Robinette v. Commissioner of I.R.S.*, 439 F.3d 455 (8th Cir. 2006), the Collection Due Process hearing was created as a consequence of Congress' concern with potential abuses by the I.R.S. in their administrative authority to seize a taxpayer's property. See *Robinette*, 439 F.3d at 458. The Collection Due Process Hearing is, under I.R.C. §6330, part of the process which was due under the circumstances of this case.

Congress said the Petitioner shall be granted a due process hearing.

The Petitioner had a Due Process right to be heard. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The Respondent arbitrarily and capriciously denied the Petitioner the right to be heard in person. There clearly exists a factual dispute as to whether she was heard through her representative, Mr. Paul.[15] This factual dispute was material, as the Tax Court was in the position of determining whether to disturb the outcome of

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[15] In evidence at Petitioner's Reply, Dkt. 4, Ex.s 16, 17; Transcript, Dkt. 23, pg. 8, lines 12-23; pg. 13, lines 19-21

a proceeding that may never have been held. Because a material factual dispute existed as to whether a Collection Due Process Hearing was ever conducted, summary judgment was inappropriate in this cause and the cause must be REVERSED and REMANDED.

III. THE TAX COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Tax Court Subject Matter Jurisdiction[16] rises and falls on the issuance of a lawfully valid "Statutory Notice of Deficiency" pursuant to I.R.C. §6212(a), which states:

> If the **Secretary determines** that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 **he is authorized** to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office. [emphasis added]

To establish that the Tax Court did NOT have subject matter jurisdiction to grant the Respondent's motion for summary judgment in the Case in Chief, this Court simply needs to answer the question: **'Who is authorized to <u>send</u> "notice of such deficiency to the taxpayer by certified mail or registered mail", pursuant to I.R.C. §6212(a)'?** This question has never been answered by this Court or the Cir. Courts, which have consistently chosen to hear a different question, which will be discussed below. However this case clearly rests on the clear and unambiguous language of I.R.C.

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[16] A notice of deficiency to the taxpayer [is] a jurisdictional prerequisite to Tax Court, *Laing v. U.S.*, 423 U.S. 161 (1976)

§6212(a) that it can simply be paraphrased as follows: "*The person*[17] *who makes the determination of a deficiency of tax is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.*" Thus imploring this Court to ask the five questions shown in the left hand column of the table below as it relates to I.R.C. §6212(a):

Who is the person?	Cherry Elder	Sharon Brown
Did the person have delegated authority from the Secretary to make a determination of a tax deficiency?	No	No
Was a determination (*the review and approval of a subscribed return*) of a deficiency of tax made?	No	No
Was a determination of a deficiency of tax made by the authorized delegate?	No	No
Did the person who made the determination of a deficiency of tax send the notice of such deficiency?	No	No

Setting aside the provision of I.R.C. §§6861 and 6851 (jeopardy and termination assessments), which are not applicable to this case, it is clear that the determination of a deficiency of tax can only occur with the creation of a subscribed return as shown in the chart below.

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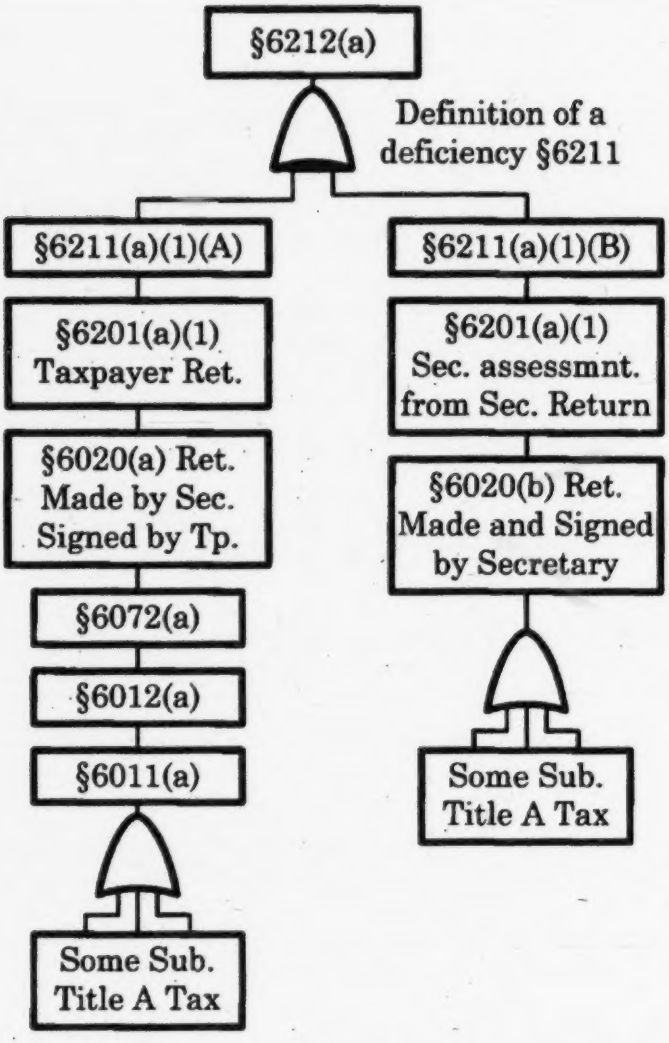
[17] The word "person", as used in the paraphrase, means one with delegated authority from the Secretary of Treasury to perform the prescribed function on his behalf.



Therefore, reviewing the evidence provided to the Petitioner by the Secretary's disclosure office – which was discussed in great detail earlier and is summarized in the preceding table as a convenience to the Court – it should be patently obvious that the documents the Respondent alleges were sent to the Petitioner as "notice(s) of deficiency", by Cherry Elder, or Sharon Brown, could not have been "*notice[s] of such deficiency*" or "Statutory Notices of Deficiency" since they did not meet the most basic mandates of Congress as set forth in I.R.C. §6212(a).

That is, neither Ms. Elder nor Ms. Brown, were authorized to act in the capacity of the Secretary to make a determination of a deficiency of tax and send a notice of such deficiency to the Petitioner.

CONCLUSION

For the foregoing reasons, the Petitioner, Michelle Leigh Selgas prays that this Court grant her petition for writ of certiorari.

Respectfully submitted,

/s/ Michelle Leigh Selgas

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